



June 30, 2014

Mr. Karl Palmer  
Chief, Safer Consumer Products Branch  
Safer Products and Workplaces Program  
California Department of Toxic Substances Control  
Sacramento, CA 95812-0806  
Sent *via* email to [SaferConsumerProducts@dtsc.ca.gov](mailto:SaferConsumerProducts@dtsc.ca.gov)

**RE: California Safer Consumer Products Regulation; Proposed Priority Product Profiles and Listing Process; ACA Comments**

Dear Mr. Palmer,

The American Coatings Association (ACA)<sup>1</sup> appreciates the opportunity to submit the following comments on the Safer Consumer Products program and, more specifically, the draft Priority Product Profiles and the Priority Product listing process. ACA worked with the California Department of Toxic Substances Control (DTSC or the Department) as it promulgated the Safer Consumer Products Regulations over the last five years and will strive to provide constructive input during the listing process.

ACA represents paint and coatings manufacturers, raw materials suppliers, and distributors, many of which manufacture other formulated products and allied products like paint strippers, which are the subject of this listing process. We welcome the opportunity to comment on the proposed Priority Products, Paint and Varnish Strippers containing Methylene Chloride (DCM) and Spray Polyurethane Foam Systems containing Unreacted Diisocyanates, since our members will be impacted if DTSC lists these products as Priority Products.

We appreciated the opportunity to discuss the draft Priority Product Profiles with DTSC staff during the Priority Product Workshops and breakout sessions on Paint and Varnish Strippers containing DCM. Building off of these discussions, we submit the following comments for DTSC's consideration.

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<sup>1</sup> The American Coatings Association (ACA) is a voluntary, nonprofit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services.

## **I. Major Concerns**

ACA has a number of concerns with the first round of the California Safer Consumer products listing process.

### **A. The Safer Consumer Products Program has strayed from the underlying purpose of the green chemistry initiative.**

Since the proposed Priority Products were announced, the Department's policy has been out of alignment with the original law that established the green chemistry program. DTSC is asking questions that are not relevant to achieving the goals of the program, which were to establish a process to evaluate chemicals of concern in products and limit the exposure or hazard posed by the chemical of concern.<sup>2</sup>

We question DTSC's focus on hazard reduction as the principal means to accomplish the goals of the green chemistry program. We acknowledge hazard reduction as one approach to reducing the potential risks posed by chemicals of concern in a product, but this should not be the sole focus. The green chemistry law envisions two approaches: (a) limiting exposure to the chemical of concern; and (b) reducing the level of hazard posed by the chemical of concern.<sup>3</sup> In accordance with the statutory directive, we ask DTSC to recognize both approaches as being equally valid and not focus solely on "intrinsic" hazard of chemical ingredients in evaluating the risk associated with the use of chemical-product combinations.

In addition, with regards to chemicals of concern, the Department continues to ask the question: "Is it necessary?" This question is not relevant and overly simplifies the Alternative Analysis (AA) process, which is a disservice to the entire program. The question that the Safer Consumer Products Regulations ask is: "is there a functionally acceptable, technically feasible and economically feasible alternative?" DTSC is required, by the regulations, to include a cost benefit analysis. The "is it necessary?" question overlooks the true focus of the regulations. DTSC's focus on the necessity of chemicals in products provides further indication that the Department is ignoring the option to limit exposure to hazardous chemicals. Chemicals exist that are both necessary and toxic, but through proper exposure controls can be used safely. Continuing to use this rhetoric shows a disregard for the approaches outlined in the Safer Consumer Products regulations. Instead of closely following the regulations, the listing process is igniting fear in the general public in an effort to eliminate chemicals from the marketplace.

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<sup>2</sup> California AB 1879, part (1).

<sup>3</sup> Cal. Health & Safety Code § 25253(a)(1).

**B. The Department should explain its selection methodology and provide more transparency during the Priority Product selection.**

We are concerned with the lack of transparency surrounding the selection process for product-chemical combinations to be listed as Priority Products. The green chemistry statute envisions a process of identifying and prioritizing “those chemicals or chemical ingredients in consumer products that may be considered as being a chemical of concern.”<sup>4</sup> The Department has not provided information regarding why these particular product-chemical combinations were selected as draft Priority Products. It is still unclear what criteria the Department relied on to prioritize these products or whether some outside entity petitioned the Department to list any of these products. A lack of transparency in the prioritization process leads to a lack of certainty and predictability, ultimately undermining stakeholder confidence in the Safer Consumer Products program. Regulated entities that will potentially be subject to the regulatory process are left wondering why these particular Priority Products were selected and what products will be next.

We ask the Department to explain why it selected the first three proposed Priority Products. DTSC has noted that it does not like to use “-ST” words—such as worst, least, best—when describing its approach to selecting product-chemical combinations for the regulatory process. We understand there is no perfect formula for selecting products, but the Department is still required to prioritize chemicals and should explain its methodology. We hope that the methodology becomes clearer once the rulemaking package is assembled for the formal administrative process.

**C. The release of the first three proposed Priority Products was seriously flawed and should be improved for future listings.**

DTSC has stated publically that the Safer Consumer Product Regulations are a forum to “have a conversation with industry.” Prior to future listings, the Department should contact affected industries before making an announcement and publishing regulatory materials in support of a Proposed Priority Product listing.

For the initial listing, the Department made a spectacular announcement regarding the Priority Products without first contacting affected industries. We are not aware of any instance where the Department reached out to a potentially-affected entity prior to the announcement. DTSC has indicated on multiple occasions that it wants to have a straightforward conversation with industry, but the surprise March 2014 announcements at the press conference and release of the proposed Priority Product Profiles undermined the opportunity for dialogue. Further, the opportunity to further develop and improve the profiles *before* releasing this information to the

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<sup>4</sup> Cal. Health & Safety Code § 25252(a).

public was lost. (emphasis added). This issue will be described in greater detail in the next section.

In addition, the process for announcing the proposed product-chemical combinations should be carefully conducted so as not to stigmatize and negatively impact products before they are formally listed. The announcement on March 13, 2014 demonstrated a lack of sensitivity to the potential negative market impacts on products that would result from a public webcast. The public announcement was especially problematic since some of these products will ultimately not become subject to the Safer Consumer Products regulatory program. Unfortunately, the damage was already done. In the future, we ask that the Department consider how it announces its proposals and what materials it releases to the public.

Prior to future releases, ACA requests that the Department:

1. Consult with stakeholders before releasing information regarding their products
2. Conduct data call-ins to collect relevant exposure information
3. Conduct peer review prior to releasing product profiles

**D. The proposed Priority Product Profiles should be amended or removed from DTSC's website.**

The Department should ensure that materials it releases to the public through announcements and on its website are complete and accurate. In an effort to address the flaws made during the release of the Priority Product Profiles, we ask that DTSC either: (1) correct technical and factual errors in the Priority Product Profiles and rerelease these documents; or (2) remove these documents from the website and include them as an element of the regulatory package.

At the public workshop, DTSC admitted that the Priority Product Profile for DCM paint strippers, for example, was incomplete and may contain inaccuracies, but argued that this is merely the first step in the listing process. During the workshops, we asked that the Priority Product Profile and the website clearly state that the document is in draft form and requested that DTSC correct the inaccuracies. DTSC agreed to clarify this on the website, but did not commit to revising the profile. We appreciate DTSC's efforts to include disclaimers in the Priority Product Profiles and provide a note on the website. But we still believe more steps should be taken to fix this issue.

The goal of the Safer Consumer Products program is to signal the market for future regulations, not to severely disrupt the marketplace before a product-chemical combination is even evaluated for listing. In the future, we ask that DTSC refrain from posting a Priority Product Profile that appears to be final until it has contacted potentially affected industries, announced the proposed

Priority Products, collected information, and initiated the formal administrative rulemaking process.

**E. DTSC should focus on the current listing process and provide adequate justification for the Proposed Priority Products.**

As described in the following section, the Department should focus its efforts on the current listing process and adhere to the requirements of the Safer Consumer Products regulations.

**II. Process for Identifying and Prioritizing Product-Chemical Combinations**

We urge DTSC to follow the principles in the green chemistry legislation that established the Safer Consumer Products Program and strictly adhere to the regulatory requirements laid out in the final Safer Consumer Products regulations. In their current form, the Priority Product Profiles do not satisfy the strict requirements of the regulations and fail to provide an adequate rationale for listing the proposed Priority Products. The listing process is critical since every future action—from the Alternative Analysis to the Department’s regulatory responses—flows from this first step. We understand that DTSC is in the preliminary stages of the listing process, but the Department must ensure that it follows the regulatory framework laid out in Article 3 of the Regulations.

DTSC should focus on the listing process. At this stage, no part of the regulatory process should be predetermined. We ask that the Department not skip to the Alternatives Analysis or regulatory response discussion until after the Priority Products have been formally listed through the administrative process.

**A. The regulatory package should clearly articulate the Department’s rationale for listing the Proposed Priority Products based on the key prioritization principles.**

DTSC should provide a clear rationale for listing the Priority Products by identifying the key prioritization factors and explain how its evaluation resulted in the proposed listing. The Priority Product Profiles suffer from a lack of focus, listing all potential exposures and impacts without keying in on the most important considerations. DTSC does not clearly articulate which exposure pathways and impacts it prioritizes to serve as the basis for the listing. According to section 69503.2, DTSC must identify Priority Products that meet the following criteria:

1. There must be potential public and/or aquatic, avian, or terrestrial animal or plant organism exposure to the Candidate Chemical(s) in the product; and
2. There must be the potential for one or more exposures to contribute to or cause significant or widespread adverse impacts.

Without prioritizing the specific toxicological endpoints DTSC used as a rationale for the listing, a responsible entity is not clear which exposure pathways to focus on during the Alternatives Analysis. We recognize that responsible entities must consider the spectrum of potential exposures and impacts when conducting the Alternatives Analysis. As a practical matter, however, the AA and any resulting regulatory responses will—and should—focus on the most significant impacts identified by the Department. If DTSC wants to have a conversation with industry, the Department should clearly explain the rationale for listing by citing the endpoints and exposure scenarios that are most significant.

Further, DTSC should define the term “potential public/aquatic exposure,” and “significant or widespread adverse impacts.” Stakeholders are confused about how the terminology in the regulations translates to the Priority Product Profiles. DTSC should be clear about its assessment of potential product hazards and exposures as part a part of the Priority Product listing process in the Safer Consumer Products program.

**B. DTSC must evaluate other California and federal laws and regulations that regulate the product and Candidate Chemical when determining whether to list a particular Priority Product.**

Evaluating other California state and federal laws and regulations that regulate both the product and candidate chemical is a critical step in the listing process. The green chemistry statute bars DTSC from superseding the regulatory authority of any other department or agency.<sup>5</sup> Further, the Department cannot “duplicate or adopt conflicting regulations for product categories already regulated or subject to pending regulation consistent with purposes of this article.”<sup>6</sup> The Safer Consumer Products regulations further describe the process for assessing other laws and regulations.

Article 3 of the Safe Consumer Products regulations describes the process for considering and evaluating other regulatory programs. First, DTSC must consider the scope of other State and federal laws that regulate the product or chemical in the product, and the extent to which these other regulatory requirements adequately address the potential adverse impacts and exposure pathways that serve as a basis for the listing.<sup>7</sup> After considering the scope of other regulatory programs, DTSC must make the following determination:

If a product is regulated by another entity with respect to the same potential adverse impacts and potential exposure pathways, and potential adverse waste and

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<sup>5</sup> Cal. Health & Safety Code § 25257.1(b).

<sup>6</sup> Cal. Health & Safety Code § 25257.1(c).

<sup>7</sup> Cal. Health & Safety Code § 25252.2(b)(2).

end-of-life effects, the Department may list such a product-chemical combination as a Priority Product *only* if it determines that the listing would meaningfully enhance protection of public health and/or the environment with respect to the potential adverse impacts, exposure pathways, and/or adverse waste and end-of-life effects that are the basis for the listing.<sup>8</sup> (emphasis added).

For example, if a Product Profile identifies air emissions from facilities as a potential exposure pathway that serves as a basis for the listing, then DTSC would be required to consider the extent to which the federal Clean Air Act (CAA) adequately addresses the same exposure pathway and potential impacts. The Department would then need to demonstrate that the listing would meaningfully enhance the protection of public health or the environment, above and beyond the CAA regulations, with regards to exposures to air emissions from facilities.

Regulatory overlap is a fundamental consideration in the listing process that should not be downplayed. DTSC has argued that the green chemistry approach to safer chemicals is inherently different and does not overlap with most other regulatory schemes. We disagree. DTSC must, at the very least, identify all applicable regulations that touch on any of the exposures or impact areas the Department identified as a basis for the listing. Given the breadth of regulatory actions available to the Department under the Safer Consumer Products regulations, the opportunities for overlapping, inconsistent, or conflicting regulations are many. Then the Department may only list a product-chemical combination if it determines there is a gap or weakness in existing regulations and the listing would meaningfully enhance the protection of human health or the environment.

**C. DTSC should not predetermine which potential alternatives are deemed acceptable or “safer” during the listing process.**

The process for identifying and prioritizing product-chemical combinations is not the appropriate time for DTSC to make determinations regarding the acceptability of alternatives.

Predetermining the outcome of the Alternatives Analysis process during the listing process is inappropriate and poisons future stages of the regulatory process. The Safer Consumer Products regulations outline a defined process for conducting Alternative Analyses and evaluating alternatives after the listing process.

The Safer Consumer Product regulations provide that DTSC may “consider whether there is a readily available safer alternative that is functionally acceptable, technically feasible, and economically feasible” when determining whether to list a product-chemical combination.<sup>9</sup> This consideration is another factor in the decision-making process when determining whether to list a

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<sup>8</sup> *Id.*

<sup>9</sup> Cal. Health & Safety Code § 69503.2(b)(3).

product-chemical combination as a Priority Product. This section in Article 3 does not, however, allow the Department to begin making assumptions or drawing conclusions regarding potential alternatives. This step is reserved for the AA process and regulatory response phase only after the product has been listed.

### **III. Proposed Priority Product Profile for Paint Stripped with DCM**

ACA has identified missing elements and inaccuracies in the proposed Priority Product Profile for paint strippers with DCM. We ask that DTSC correct inaccuracies in the Priority Product Profile and reintroduce these materials during the formal administrative rulemaking process. We again assert that a conversation with potentially impacted entities prior to the announcement and release of the proposed Priority Product Profiles would have reduced the number of inaccuracies and improved the Profile.

ACA and its membership understand the underlying hazard and potential for exposure to consumers with DCM. We stress that appropriate warnings for safe use of paint and varnish strippers DCM is the responsibility of the manufacturer as it is in the best position to know and direct proper conditions for safe use. ACA has created extensive industry-wide guidance for the labeling paint and varnish strippers containing DCM to limit exposure to DCM. These label statements have, in turn, become the accepted industry standard conditions necessary for safe use, which DTSC did not consider when developing the Priority Product profiles. Furthermore, the Consumer Product Safety Commission (CSPC) conducted a review of ACA's labeling guidance on DCM in 1987 and found that these label statements met the standards of the Federal Hazardous Substance Act (FHSA) and create conditions of safe use and that there is no risk for consumer exposure.



The following label is included in the Guide for products that contain DCM:

<p>For a two-panel label, split here and add: “Read other cautions on back/side panel.” [16CFR1500.121(a)(3)]</p>	<p style="text-align: center;"><b>WARNING!</b></p> <p style="text-align: center;">VAPOR HARMFUL. HARMFUL OR FATAL IF SWALLOWED. CAUSES EYE BURNS. CAUSES SKIN IRRITATION.</p> <p>Contains methylene chloride, which has been shown to cause cancer in certain laboratory animals. Risk to your health depends on level and duration of exposure.<sup>10</sup></p> <p>May affect the brain or nervous system causing dizziness, headache or nausea. REDUCES THE BLOOD’S OXYGEN-CARRYING CAPACITY.</p> <p>NOTICE: Reports have associated repeated and prolonged occupational overexposure to solvents with permanent brain and nervous system damage. Intentional misuse by deliberately concentrating and inhaling the contents may be harmful or fatal.</p> <p>Contact with flame or hot surface may produce toxic/corrosive gases. Keep away from heat and flame. Do not smoke. Prevent build-up of vapors by opening all windows and doors to achieve cross-ventilation.</p> <p><b>Use only with adequate ventilation.</b> Use this product outdoors, if possible. If you must use it indoors, open all windows and doors or use other means to ensure fresh air movement during application and drying. If workplace exposure monitoring indicates methylene chloride levels cannot be controlled to below the established OSHA exposure limits (29 CFR 1910.1050), then appropriate respiratory protection must be provided. Obtain professional advice before using respiratory protection. A dust mask does not provide protection against vapors. Do not use in basement or other unventilated area. Avoid contact with eyes and skin.</p> <p>Open containers carefully and close after each use. Clean up rags, papers and waste promptly. Allow solvent to evaporate then dispose of in metal container.</p> <p><b>First Aid:</b> If swallowed, do not induce vomiting. Get medical attention immediately. In case of eye contact, flush immediately with plenty of water for at least 15 minutes and get medical attention; for skin, wash thoroughly with soap and water.</p> <p style="text-align: center;"><b>KEEP OUT OF REACH OF CHILDREN</b></p> <p style="text-align: center;">Company name and address</p>
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<sup>10</sup> The user must select the most appropriate statement.

A review of existing labels in commerce for paint stripping products shows that the following statements regarding the use of gloves and other personal protection equipment are generally included in special instructions on the label.

**Protective Gloves.** Wear gloves with as much resistance to the chemical ingredients as possible. Laminate film gloves offer the best protection. Other glove materials, such as nitrile rubber, neoprene, and PVC will be degraded, but may provide protection for some amount of time, based on the type of glove and the conditions of use. Consult your glove supplier for additional information. Gloves contaminated with product should be discarded and not reused.

When reviewing the label statements listed above, it is clear that the paint industry takes the potential for exposure to DCM very seriously. These label statements, which are listed on both industrial and consumer versions of these products, reinforce the considerations necessary for safe use and limit the potential for exposure to DCM.

Again, ACA acknowledges the potential for exposure to DCM from use of the Priority Product. ACA's labeling guidance has created industry wide practice for the use of DCM, following the label's hazard and precautionary statements will create a 'normal use' scenario that has little to no potential for exposure to DCM. Our industry has developed precautionary measures to encourage the safe use of DCM, and DTSC should consider this during the Priority Products listing process.

#### **A. Priority Product Identification & Description**

The Brick classification is not useful for listing of Paint and Varnish Strippers containing DCM. ACA request that DTSC work with the manufacturers of Paint and Varnish Strippers containing DCM to determine a more useful identification system.

#### **B. Rationale for Priority Product Selection**

As stated in section II.A, ACA believes that DTSC has not clearly defined the toxicological endpoints that the Department views as significant and serve as a basis for the listing. ACA respectfully requests that DTSC prioritize and define which exposure pathways are deemed significant and resulted in the proposed listing of Paint and Varnish Strippers containing DCM. The Priority Product Profile lists a wide range of health hazards associated with DCM and an extensive list of exposure pathways. However, there is no summary drawing this information together and explaining how the potential exposures contribute to or cause significant or

widespread adverse impacts as required by the regulations.<sup>11</sup> A solid connection back to the key prioritization criteria would be helpful for stakeholders.

### **C. Other Regulatory Programs**

DTSC should identify all applicable regulations that touch on all of the exposures or impact areas the Department identified in the Methylene Chloride Priority Product Profile. The Methylene Chloride Priority Product Profile only identifies three other regulatory programs addressing DCM including the California Air Resources Board's (CARB) paint thinner regulations and California's Occupational Health and Safety Administration's (OSHA) permissible exposure limits. The Profile inexplicably includes Europe's ban on paint strippers containing DCM while seemingly ignoring many other regulations in the United States that are intended to limit exposure. DTSC must consider the breadth of other regulatory programs regulating this product and chemical.

For example, the Consumer Product Safety Commission (CPSC) addresses certain risks associated with use of paint strippers containing DCM. On September 14, 1987, the CPSC issued a "Statement of Policy" concerning products containing DCM. Under this enforcement policy, CPSC took the position that methylene chloride and products containing it are "toxic" within the meaning of the FHSA because they present a potential risk of cancer to humans. Under the FHSA, any hazardous substance intended or suitable for use in or around a household must bear appropriate cautionary labeling. The labeling for methylene chloride identified in the industry labeling guide meets CPSC's requirements of Section 2(p)(1) of the FHSA as to precautionary measures for the hazard of inhaling the vapor from methylene chloride. Of course, the product labeling must meet all other FHSA requirements and address any other hazards presented by the product.

Other regulations that address potential exposures and impacts from paint strippers and DCM include: California's Proposition 65; the U.S. Environmental Protection Agency's Hazardous Air Pollutant regulations for DCM under the CAA;<sup>12</sup> and federal OSHA's workplace limits and exposure monitoring requirements for all workplaces using DCM.<sup>13</sup> This list is not exhaustive; a range of other federal and California regulatory programs address the same potential exposures and impacts.

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<sup>11</sup> Cal. Health & Safety Code § 69503.2.

<sup>12</sup> 40 C.F.R. Part 63 Subpart HHHHHH.

<sup>13</sup> 29 C.F.R. 1910.1052.

#### **D. Alternatives to Methylene Chloride Paint Strippers**

We ask DTSC to remove any statements about what it deems a safer alternative at this time. The profile notes that DTSC does not recognize *N*-Methyl-2-pyrrolidone (NMP) as a safer alternative. Predetermining the outcome of the AA process during the listing process is inappropriate and poisons future efforts to evaluate alternatives. The updated Priority Product Profile notes that “[p]ossible alternatives mentioned in this document that may meet one or more of the product’s functional requirements are not a determination by the department that these alternatives are safer than the product-chemical combination and should not be construed as an endorsement of any alternative or product.”<sup>14</sup> We believe this disclaimer is inadequate and references to the appropriateness of NMP in the Priority Product Profile should be removed in their entirety.

#### **IV. Conclusion**

Thank you for your consideration of our comments regarding the Safer Consumer Products Regulations and the Proposed Priority Product Profiles. Please do not hesitate to contact us if you have any questions regarding our comments, and we welcome the opportunity to provide additional information as the regulatory process proceeds.

Sincerely,

/s/

Timothy Serie, Esq.  
Counsel, Government Affairs

/s/

Stephen Wieroniey  
Specialist; Health, Safety, and  
Environmental Affairs

*\*\* Submitted via email \*\**

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<sup>14</sup> Priority Product Profile for Paint and Varnish Strippers with Methylene Chloride, pg. 2.